



The following constitutes the Memorandum Decision of  
the Court. Signed: August 10, 2022

A handwritten signature in black ink, reading "Roger L. Efremsky", is positioned above the judge's name.

Roger L. Efremsky  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

In re

PACIFIC STEEL CASTING COMPANY LLC,  
Debtor.

Case No. 19-40193  
Chapter 7

SARAH L. LITTLE, Chapter 7 Trustee,  
Plaintiff,

AP No. 19-4057

v.

SPEYSIDE FUND, LLC, a Delaware  
limited liability company, et al.,  
Defendants.

**Memorandum Decision Granting *Daubert* Motions**

The Speyside Defendants have filed a motion seeking to  
exclude certain parts of the reports of Plaintiff's expert  
witness Austin Wade (the "Wade Reports"). Defendant UHY, LLP

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1 ("UHY") has filed a motion seeking to exclude the same parts of  
2 the Wade Reports. UHY also seeks to exclude certain parts of the  
3 reports of Andrew Mintzer (the "Mintzer Reports"), Plaintiff's  
4 expert witness on auditing issues, because Mr. Mintzer relies on  
5 the challenged assumptions and opinions expressed by Austin Wade  
6 (collectively, the "*Daubert* Motions"). Docket Nos. 184-187 and  
7 190-192. Plaintiff has filed Opposition. Docket Nos. 212-213.  
8 Defendants have filed Replies. Docket Nos. 215 and 219. The  
9 matter has been fully briefed.

10 The court assumes the parties' familiarity with the  
11 underlying facts, the procedural history, and the issues under  
12 consideration.

### 13 **I. Background**

#### 14 **A. Factual Background**

15 In 2014, chapter 11 debtor Pacific Steel Casting Company,  
16 now known as Second Street, entered into a Bankruptcy Code §363  
17 sale of substantially all of its steel foundry assets to Speyside  
18 Fund or its assignee, referred to here as Pacific Steel or the  
19 Debtor. The sale was documented with an asset purchase agreement  
20 (the "APA") and approved by the court. In connection with the  
21 sale, Pacific Steel assumed Second Street's collective bargaining  
22 agreement with its union and agreed to contribute to the  
23 associated multiemployer pension plan (the "MEP").

24 Under controlling ERISA law, an asset sale of this type  
25 would have been deemed a withdrawal by Second Street from the MEP  
26 creating an immediate obligation for it to pay the approximately  
27 \$27 million withdrawal liability owed at that time unless certain

1 conditions were met.

2 In order to forestall that immediate obligation, the sale  
3 was structured to comply with the provisions of ERISA that permit  
4 postponing or entirely avoiding this withdrawal liability under  
5 certain conditions (the "Contingent Withdrawal Liability").

6 More than a year following the closing of the sale, Second  
7 Street confirmed its chapter 11 plan. The plan was also  
8 structured to conform to the ERISA requirements regarding  
9 avoiding the Contingent Withdrawal Liability.

10 In order to avoid Second Street's immediate obligation to  
11 pay the Contingent Withdrawal Liability, Pacific Steel had to  
12 remain in compliance with certain provisions of ERISA for a  
13 period of five years following the sale. One of these provisions  
14 was to post a bond payable to the union's pension trust if  
15 Pacific Steel defaulted in its performance of these requirements.  
16 In December 2017, the bond provided for the pension trust was  
17 canceled by its issuer. This made Second Street's withdrawal  
18 liability no longer contingent. Pacific Steel continued to  
19 contribute to the MEP for another year and then ceased operating  
20 and filed this chapter 7 case.

## 21 **B. Procedural Background**

### 22 **1. First Amended Complaint**

23 In the first amended complaint (the "FAC"), Plaintiff  
24 alleges that the Speyside Defendants damaged Pacific Steel and  
25 its creditors by their improper accounting practices, by making  
26 impermissible distributions to its owners, and by breaching their  
27 fiduciary duties. Docket No. 70, FAC. Plaintiff also alleges that

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1 UHY knowingly aided and abetted the Speyside Defendants' breach  
2 of their fiduciary duties when it failed to properly audit  
3 Pacific Steel's financial statements.

4 When the sale closed, Pacific Steel accounted for its  
5 purchase of the business from Second Street as a "bargain  
6 purchase gain." Plaintiff alleges that this accounting for the  
7 transaction was improper and Pacific Steel's financial statements  
8 were thereafter misleading. Plaintiff alleges that there was no  
9 bargain purchase gain and Pacific Steel failed to properly  
10 account for the Contingent Withdrawal Liability. Docket No. 70,  
11 FAC, ¶¶ 11, 61-62. This theoretical construct fuels the  
12 allegations that Pacific Steel was insolvent at inception and  
13 continuously thereafter, and management's decisions ensured the  
14 company would fail before the five-year period elapsed. She  
15 alleges damages of some \$40 million.

## 16 **2. Pending Motions for Partial Summary Judgment**

17 Plaintiff, joined by Second Street, has filed a motion for  
18 summary judgment in which she contends, *inter alia*, that (1) the  
19 doctrines of judicial and equitable estoppel preclude the  
20 Speyside Defendants from taking the position that they are not  
21 responsible for paying the Contingent Withdrawal Liability; (2)  
22 applying rules of contract interpretation to the APA shows that  
23 the Speyside Defendants assumed the Contingent Withdrawal  
24 Liability (\$2.03(b)), or agreed to indemnify Second Street for it  
25 (\$7.10(a)); (3) if the APA is deemed ambiguous and the court  
26 considers extrinsic evidence, it will show that Plaintiff's  
27 interpretation of the APA is correct; (4) the "equities" require

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1 Plaintiff to prevail. Docket No. 172.

2 The Speyside Defendants have moved for partial summary  
3 judgment as to the fact of their liability for the Contingent  
4 Withdrawal Liability. Docket Nos. 176, 180-183. Plaintiff, joined  
5 by Second Street, has filed opposition. Docket Nos. 195-199. The  
6 Speyside Defendants have also moved for partial summary judgment  
7 as to the amount of that liability if the court finds it exists.  
8 Docket No. 178. These motions have been fully briefed.

9 UHY has filed a motion for summary judgment in which it  
10 contends that it may not be held liable for knowingly aiding and  
11 abetting the breach of fiduciary duty allegedly committed by the  
12 Speyside Defendants. Docket Nos. 148-150. The matter is under  
13 submission. Docket Nos. 158-159.

### 14 **3. Plaintiff's Experts**

15 Plaintiff has retained two expert witnesses. Austin Wade is  
16 identified as her witness for (1) analysis of New Pacific Steel's  
17 "accounting books and records;" (2) opining on the solvency of  
18 Pacific Steel from 2014 to the 2019 petition date; and (3) the  
19 "harm caused to the Debtor's business as a result of management  
20 decisions." Docket No. 187, Toral Dec., Ex. 1, Wade Report at 1;  
21 Ex. 2, Wade Rebuttal Report. Andrew Mintzer is identified as  
22 Plaintiff's expert witness regarding whether Pacific Steel's  
23 audited financial statements were prepared in accordance with  
24 generally accepted accounting principles ("GAAP") and whether UHY  
25 performed its audits in accordance with generally accepted  
26 auditing standards ("GAAS"). Docket No. 186, Toral Dec., Ex. 5,  
27 Mintzer Report at 1.

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1 **II. Legal Standard**

2 Rule 702 of the Federal Rules of Evidence provides:

3 A witness who is qualified as an expert by knowledge, skill,  
4 experience, training, or education may testify in the form  
of an opinion or otherwise if:

5 (a) the expert's scientific, technical, or other specialized  
6 knowledge will help the trier of fact to understand the  
evidence or to determine a fact in issue;

7 (b) the testimony is based on sufficient facts or data;

8 (c) the testimony is the product of reliable principles and  
9 methods; and

10 (d) the expert has reliably applied the principles and  
methods to the facts of the case.

11 Plaintiff has the burden of establishing that her experts'  
12 testimony is relevant, reliable, and admissible. *Lust ex rel.*  
13 *Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir.  
14 1996); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597  
15 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

16 The court acts as a gatekeeper in this context and must  
17 determine that the expert used proper methods, and adequately  
18 explained them. *United States v. Hermanek*, 289 F.3d 1076, 1093  
19 (9th Cir. 2002) (court considers whether methodology underlying  
20 expert's testimony is valid and can be applied to facts in issue;  
21 bare qualification alone does not establish admissibility); *In re*  
22 *Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 984 F.Supp.2d  
23 1021, 1026 (C.D. Cal. 2013) (court must assure expert used  
24 sufficient data, employed reliable methods, applied them to data  
25 in reliable way). The court exercises its discretion here with a  
26 degree of flexibility in applying Rule 702 and must consider  
27 whether vigorous cross-examination is a preferable way to deal

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1 with "shaky but admissible" expert testimony. *Daubert*, 509 U.S.  
2 at 598. However, if there is too great an "analytical gap"  
3 between the expert's data and the offered opinion, the court may  
4 exclude the opinion. *General Elec. Co. v. Joiner*, 522 U.S. 136,  
5 146 (1997).

### 6 **III. Discussion**

7 The Speyside Defendants have moved to exclude (1) certain of  
8 Mr. Wade's opinions because he and Plaintiff's counsel  
9 acknowledged at his deposition that they were beyond his  
10 expertise; (2) Mr. Wade's "probability of failure" determinations  
11 because they are not based on any discernible methodology and  
12 thus are not reliable; (3) Mr. Wade's factual narrative because  
13 this sort of "story" - not based on first hand knowledge of any  
14 events but on his weighing of the evidence - is not the province  
15 of an expert, and he may not opine on the motives or subjective  
16 belief of the Defendants. The Speyside Defendants argue that  
17 these opinions in the Wade Reports must be excluded as violative  
18 of Rule 702 and the *Daubert* standard. UHY argues that the court  
19 should exclude these aspects of the Wade Reports and should also  
20 exclude the opinions in the Mintzer Reports that rely on Mr.  
21 Wade's probability of failure analysis. Docket No. 191, Quadrozzi  
22 Dec., Ex. D, Mintzer Report, *inter alia*, ¶¶ 86-93, 113.

23 In response, Plaintiff contends that both Wade Reports  
24 comply with the *Daubert* standard in every respect and Mr. Wade  
25 may be challenged on cross-examination to deal with any weakness  
26 in his work. Plaintiff also argues that UHY has waived any  
27 *Daubert* objection because it failed to do so before its motion

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1 for summary judgment was fully briefed. (This argument lacks  
2 merit and the court dismisses it without further discussion.)

3 The court will address each challenged category of the Wade  
4 Reports in turn.

5 **A. Opinions Disclaimed at Deposition**

6 An expert may not testify on topics that the expert and his  
7 counsel concede are beyond his expertise. *Pension Comm. of Univ.*  
8 *of Montreal Pension Plan v. Banc of Am. Sec. LLC*, 691 F.Supp.2d  
9 448, 461 n.65 (S.D.N.Y. 2010) (expert may not testify on matters  
10 on which expert is not offered); *Madison v. Courtney*, No. 18-cv-  
11 00671, 2019 WL 8263428, at \*5 (N.D. Tex., Jan. 26, 2011) (expert  
12 may not testify on matters disclaimed by counsel). This sensible  
13 - and unassailable - rule applies here and limits both the Wade  
14 Reports.

15 The Wade Report starts with the premise that Pacific Steel  
16 "assumed via indemnification" the Contingent Withdrawal  
17 Liability. The Report says, in the APA "Pacific Steel agreed to  
18 indemnify and hold [Second Street] harmless (assume) from any  
19 liability of [Second Street] caused by [Pacific Steel's]  
20 withdrawal from the pension plans." Docket No. 186, Toral Dec.,  
21 Ex. 1, Wade Report at 10. This statement is obviously an  
22 interpretation of the APA. At his deposition, Mr. Wade and  
23 Plaintiff's counsel agreed he was not offered to interpret the  
24 APA, acknowledging that it was inappropriate to do so. Docket No.  
25 212, Bagdanov Dec., Ex. 1, Wade Deposition Transcript 17:24-18:1  
26 (hereafter, Wade Tr.).

27 At his deposition Mr. Wade also backtracked on whether this

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1 was, in fact, an opinion. He stated it was merely his  
2 "understanding" that Pacific Steel "assumed [Second Street's]  
3 contingent withdrawal liability via indemnification." Wade Tr.  
4 18:15-19:2. He also said "[i]t was his "general understanding"  
5 that "they are on the hook for it." Wade Tr. 20:10-13.  
6 Plaintiff's attorney confirmed this as well, interjecting: "his  
7 assumptions are that there is an indemnification ... he is not  
8 going to opine on the interpretation of the APA." Wade Tr. 18:9-  
9 16.

10 Despite this disclaimer, the Wade Report starts with the  
11 opinion that Pacific Steel *assumed* the Contingent Withdrawal  
12 Liability by agreeing to *indemnify* Second Street for it under the  
13 APA. Wade Report at 10-13. The Report then proceeds to criticize  
14 Pacific Steel's financial statements because they do not conform  
15 to his premise: "I could find no reference to this  
16 indemnification obligation, either by means of disclosure or  
17 valuation, nor could I find any justification for the Debtor's  
18 failure to identify and quantify this obligation." Wade Report at  
19 11. He states the "contingent indemnification obligation" should  
20 have been booked "consistent with GAAP requirements." *Id.* At his  
21 deposition, however, he admitted he was not an expert on the  
22 relevant GAAP requirements and stated he deferred to Plaintiff's  
23 other expert on this issue. Wade Tr. 246:7-23 ("I probably  
24 wouldn't represent myself as an expert in GAAP standards");  
25 208:3-24 ("I never argued in my report that the Debtor needed to  
26 book that liability...that's a GAAP issue. That's in Andy's  
27 report.").

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1 The Wade Report also offers an opinion on the operation of  
2 ERISA §4204: "Pacific Steel's indemnification obligation and pre-  
3 acquisition contingent withdrawal liabilities were liabilities  
4 assumed by [Pacific Steel] in the asset sale; when the bond was  
5 canceled the contingent withdrawal liability became actual." Wade  
6 Report at 40-41. The Wade Report also criticizes the Speyside  
7 Defendants' expert: "Defendants' expert does not adequately  
8 examine the probability that the withdrawal liability assumed via  
9 indemnification would be triggered." Docket No. 186, Toral Dec.,  
10 Ex. 2, Wade Rebuttal Report at 2.

11 At his deposition, Mr. Wade and Plaintiff's counsel again  
12 backtracked and admitted that Mr. Wade was not offered as an  
13 ERISA expert and had no relevant expertise in this area. However,  
14 Mr. Wade claimed it was his "understanding and my opinion that  
15 when the pension bond was terminated that the contingent  
16 liability is going to become real." Wade Tr. 69:16-21. This is  
17 not sufficient - his understanding of this legal issue is not the  
18 proper subject of an expert's opinion and he has admitted he has  
19 no expertise to support this opinion.

20 Mr. Wade also criticizes the fact that Pacific Steel  
21 accounted for its purchase from Second Street as a "bargain  
22 purchase gain" and accuses Pacific Steel of, *inter alia*, using  
23 this accounting to conceal its "balance sheet insolvency." Wade  
24 Report at 1, 10-13. "Had the debtor properly accounted for and  
25 disclosed the contingent indemnification obligation ... then it  
26 would not have been possible to book the ... bargain purchase  
27 gain." Wade Report at 13. This opinion is necessarily premised on

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1 the application of GAAP standards. Because Mr. Wade disclaimed  
2 expertise on application of GAAP standards this opinion does not  
3 comport with Rule 702 or *Daubert*. Nonetheless, at his deposition,  
4 he persisted: "in my opinion, if it was disclosed properly, it  
5 wouldn't have been possible to book the bargain purchase gain."  
6 Wade Tr. 208:17-24. This opinion fails to pass the test required  
7 for its admissibility. Because he disclaimed expertise on GAAP  
8 standards, he may not opine on whether it was "disclosed  
9 properly."

10 In defense of Mr. Wade's opinion regarding the propriety of  
11 booking this bargain purchase gain, despite his stated lack of  
12 expertise regarding GAAP, Plaintiff argues that "his conclusion  
13 on that issue is not being offered as an opinion *per se* but as  
14 part of his critical analysis of key Debtor documents he  
15 considered in performing his insolvency analysis." Docket No.  
16 212, *Oppo*. at 25. This is singularly unhelpful, it clarifies  
17 nothing, and it fails to rebut Defendants' arguments.

18 The Wade Reports also offer the opinion that UHY's audits  
19 were inadequate and the disclosures regarding the Contingent  
20 Withdrawal Liability in Pacific Steel financial statements were  
21 inadequate or materially misleading as a result of UHY's alleged  
22 failings as an auditor. Wade Report at 33-37. Mr. Wade claims  
23 UHY's disclosures "related solely to going forward liabilities  
24 ... but did not include any disclosure or valuation of [Pacific  
25 Steel's] agreement to indemnify [Second Street] for [Second  
26 Street's] pre-acquisition withdrawal liabilities or [Pacific  
27 Steel's] obligation to post a bond." Wade Report at 12-13. He

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1 also opines that "the UHY audit work papers indicate that the UHY  
2 audit was grossly inadequate." Wade Report at 45-46.

3 At his deposition, Mr. Wade admitted he was not an expert on  
4 auditing issues and Plaintiff's counsel confirmed that  
5 Plaintiff's other expert, Andrew Mintzer, was designated for  
6 auditing issues. Wade Tr. 234:11-19 (typically wouldn't opine on  
7 audit standards); 235:11-13 (will stipulate Wade not an audit  
8 expert); 238:15-16 (we will not proffer him as an UHY audit  
9 expert).

10 In opposition to this motion, Plaintiff again tries to  
11 disavow her disavowal. She now contends that Mr. Wade's opinions  
12 on "potential defects" in the UHY audits are admissible because  
13 these are not opinions on "complex audit issues" and Defendants  
14 "overlook the nuance involved in Mr. Wade's analysis." Oppo. at  
15 27. Mr. Wade "observed" that the auditors "did not adequately  
16 test inventory or adequately disclose a large contingent  
17 liability," and because he is a certified fraud examiner, it is  
18 "perfectly reasonable" for him to opine on how Pacific Steel's  
19 financial statements "were manipulated despite being audited."  
20 Oppo. at 27. Plaintiff digs herself deeper into this unfortunate  
21 hole by claiming that Mr. Wade's opinions on UHY's audit work are  
22 merely offered to support his insolvency analysis and are not  
23 offered as an "ultimate opinion on the robustness of an audit"  
24 and he is not offering a "formal opinion" on UHY. *Id.*

25 Mr. Wade stated he was not an expert on auditing standards.  
26 Plaintiff's counsel stated Mr. Wade would not testify regarding  
27 UHY's auditing. It is not "perfectly reasonable" to backtrack in

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1 this fashion; it is not "perfectly reasonable" for Mr. Wade to  
2 opine on whether the audits involved "adequate testing" or  
3 "adequate disclosure" which then permitted "manipulated"  
4 financial statements.

5 The court agrees with Defendants that Mr. Wade may not offer  
6 opinions on UHY's audits - whether they are described as ultimate  
7 or formal - he has disclaimed his expertise on this topic and may  
8 not now reverse that. The Wade Reports' opinions on auditing  
9 issues are inadmissible.

10 Plaintiff also claims Mr. Wade may offer his opinions as an  
11 "experiential expert" citing *United States v. Wilson*, 484 F.3d  
12 267 (4th Cir. 2007). This simply does not work here in light of  
13 the fact that Andrew Mintzer is Plaintiff's expert on auditing  
14 issues and Mr. Wade's experience as an accountant - in and of  
15 itself - does not make his statements relevant or reliable.

16 The court finds inadmissible the opinions Mr. Wade and  
17 Plaintiff's counsel stated were beyond his expertise. These  
18 include (1) the application of GAAP standards, including the  
19 propriety of accounting for the purchase as a bargain purchase  
20 gain, and the GAAP rules for accounting for contingent  
21 liabilities; (2) applicable auditing standards, their performance  
22 or the failure of performance; (3) the interpretation or meaning  
23 of any provisions of the APA; and (4) the operation of ERISA as  
24 it pertains to the APA.

#### 25 **B. Probability Determinations**

26 The Speyside Defendants describe a key issue in this case as  
27 follows: "Assuming Pacific Steel bore the Second Street seller

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1 withdrawal liability, the particular likelihood of it becoming  
2 non-contingent at key measurement dates in 2014, 2015, and 2016.”  
3 Docket No. 184, Motion at 14.

4 This question is relevant for two issues: the accuracy of  
5 Pacific Steel’s financial statements and its solvency at  
6 different measurement dates. Painting with an extremely broad  
7 brush, under GAAP, contingent liabilities must be *disclosed* on  
8 financial statements if they are reasonably possible and their  
9 fair value must be *booked* if they are probable. Plaintiff’s other  
10 expert Andrew Mintzer and Defendants’ expert Jimmy Pappas agreed  
11 that in this context, probable means 70%. See Mintzer Report at  
12 19 n.94.

13 For accounting purposes, the fair value of a contingent  
14 liability is determined by reducing its gross amount according to  
15 its probability. *Matter of Xonics Photochemical, Inc.*, 841 F.2d  
16 198, 200 (7th Cir. 1988). For solvency analysis purposes, the  
17 fair value of a contingent liability is determined in the same  
18 way. *In re Imagine Fulfillment Servs., LLC*, No. Adv. 12-1514,  
19 2014 WL 3867531, \*5 (9th Cir. BAP Aug. 6, 2014) (amount of  
20 contingent claim is determined by probability contingency will  
21 occur; final state court judgment was noncontingent debt for  
22 purposes of assessing solvency).

23 In his Reports, Mr. Wade opines on this probability question  
24 in his analysis of Pacific Steel’s solvency. He starts by  
25 assuming that Pacific Steel “took on” a \$26.7 million contingent  
26 withdrawal liability through the APA and the contingency period  
27 was five years. Wade Report 40-42. (The Wade Reports describe

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1 this as a 70-month period. ERISA §4204(a)(1)(B) and (C) refer to  
2 "five plan years." The court understands this contingency period  
3 to have run to June 30, 2022.) "For solvency analysis balance  
4 sheet test purposes, I added a contingent liability to the  
5 balance sheet with fair value calculated at the estimated  
6 contingent liability gross amount multiplied by the estimated  
7 chance of business failure within the first 70 months." Wade  
8 Report at 41. He then posits a probability range for the  
9 likelihood of business failure - from 50% at inception in 2014 to  
10 100% by the end of 2017 - to calculate the fair value of the  
11 alleged contingent indemnification obligation. Wade Report at 41  
12 (50% in 8/14, 60% by 12/14, 70% by 4/15, 80% by 12/15, 90% by  
13 2016, 100% by end of 2017). He claims this probability range of  
14 50% to 100% is appropriate because "approximately 50% of  
15 businesses fail with the first five years" and "most importantly,  
16 the business did in fact fail within 70 months." Wade Report at  
17 41, 42 n.2 (listing 12 factors he used to calculate "the fair  
18 value of this indemnification obligation").

19 The Speyside Defendants and UHY contend this opinion is  
20 inadmissible under Rule 702 because Mr. Wade applied no  
21 discernable methodology for his probability analysis. *NetFuel,*  
22 *Inc. v. Cisco Sys., Inc.*, No. 18-cv-02352, 2020 WL 1274985, at \*7  
23 (N.D. Cal. Mar. 17, 2020 (noting experts must follow some  
24 discernable methodology and courts' condemnation of percentages  
25 plucked out of thin air); *Rondor Music Int'l Inc. v. TVT Recs.*  
26 *LLC*, No. CV 05-2902, 2006 WL 5105272, at \*3-5 (C.D. Cal. Aug. 21,  
27 2006) (excluding opinion where methodology difficult to

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ascertain); *Castagna v. Newmar Corp.*, No. 15-cv-249, 2020 WL 525936, at \*3-4 (N.D.Ind. Feb.3, 2020 (report excluded where opinion formed in black box without explanation of how factors were evaluated)).

In fact, Mr. Wade admitted his probability determinations were arrived at "shooting from the cuff" and were based on common knowledge and his years of experience as a forensic accountant rather than any testable criteria. Wade Tr. 36:5-25 (common knowledge, general understanding new businesses fail); 47:20-48:15 (shooting from the cuff). The Report identifies a number of factors that contributed to this increasing likelihood-of-failure analysis but Mr. Wade could not identify how each factor contributed to each of the incremental increases he applied. Wade Tr. 53:10-16 (confirms used no testable criteria). Mr. Wade also admitted he did not do - and could not do - the industry-recognized tests employed by the Speyside Defendants' expert. See Report of the Speyside Defendants' expert Jimmy Pappas employing industry-standard methodologies known as synthetic credit score test and Altman Z Score analysis. Docket No. 187, Pappas Report.

UHY also contends that the opinions in the Mintzer Reports that adopt Wade's unreliable opinions regarding probability of failure must also be excluded. *Pavo Sols., LLC v. Kingston Tech. Co., Inc.*, 2019 WL 8138163, at \*3 (C.D. Cal. Nov. 20, 2019). At his deposition, Mr. Mintzer admitted he relied on these opinions - business failure 50% likely at inception in 2014 and increasing incrementally until it reached 100% likely in 2017 and did then fail - with no testing and such testing would have been beyond

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1 his expertise. Docket No. 191, Quadrozzi Dec., Ex. E, Mintzer  
2 Deposition Tr. 51:3-5, 63-65, 149.

3 In response to the Defendants' arguments, Plaintiff insists  
4 Mr. Wade may opine as he has done because he identifies all the  
5 facts he considered and he uses Pacific Steel's business records  
6 to "tell a story of what actually happened." Oppo. at 13.  
7 Plaintiff claims that the Speyside Defendants unfairly forced Mr.  
8 Wade to try to assign percentages to each of the factors he  
9 identified in his analysis but he explained this was impossible  
10 to do. Oppo. at 16.

11 Plaintiff's response is not convincing. Mr. Wade's  
12 probability-of-failure determinations may have been based on his  
13 review of thousands of documents but they were not based on any  
14 reliable principles or discernable methods. They do appear to  
15 emerge from a black box which means they are too unreliable and  
16 subjective to be of any assistance to the court. Accordingly,  
17 they must be excluded. The Mintzer Report opinions that adopt and  
18 rely on the Wade Report's probability of failure opinions are  
19 also excluded.

### 20 **C. Factual Narrative and Interpretations**

21 The Speyside Defendants and UHY also object to the parts of  
22 the Wade Reports that they contend are factual characterizations  
23 presented in the guise of independent expertise. *Highland Cap.*  
24 *Mgmt., L.P. v. Schneider*, 379 F.Supp.2d 461, 469 (S.D.N.Y. 2005)  
25 (excluding factual narrative covering lay matters); *In re*  
26 *Lyondell Chem. Co.*, 558 B.R. 661, 668-69 (Bankr. S.D.N.Y. 2016)  
27 (excluding chronology and editorialized excerpts from emails).

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1 They also object to the Wade Reports' use of a factual narrative  
2 to opine on the subjective belief of the Defendants or their  
3 motivations or intent. *Aya Healthcare Servs., Inc. v. AMN*  
4 *Healthcare, Inc.*, No.17-cv-205, 2020 WL 2553181, at \*6 (S.D. Cal.  
5 May 20, 2020), (expert testimony regarding intent impermissible),  
6 *aff'd*, 9 F.4th 1102 (9th Cir. 2021); *Lippe v. Bairnco. Corp.*, 288  
7 B.R. 678, 687 (Bankr. S.D.N.Y. 2003) (expert may not offer  
8 personal evaluation of testimony or credibility of others),  
9 *aff'd*, 99 F.App'x 274 (2d Cir. 2004).

10 The Speyside Defendants cite several places in the Wade  
11 Reports that they claim offend these principles. Examples include  
12 the factual characterizations in the "Timeline of Significant  
13 Events" (Wade Report at 6-7, Rebuttal Report at 9); his statement  
14 that "overstatement [of inventory value] was intentional" and  
15 "designed to mislead" (Wade Report at 22); his statement that the  
16 insiders damaged the Debtor because the Debtor materially  
17 misrepresented its financials (*Id.* 44); his analysis of  
18 deposition testimony to opine on the reasons for Debtor's  
19 ownership structure (*Id.* 14). The Speyside Defendants argue that  
20 this is not the province of an expert and Mr. Wade may not opine  
21 on or offer his interpretation of the motivations or state of  
22 mind of the Speyside Defendants.

23 In opposition, Plaintiff argues Mr. Wade is just "telling a  
24 story of what actually happened" based on his review of Debtor's  
25 books and records and publicly available sources. *Oppo.* at 17.  
26 "What actually happened" will be determined at trial. This sort  
27 of recitation is not appropriate for expert testimony. The Wade

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1 Reports will be limited to exclude this sort of impermissible  
2 content which is not limited to the illustrative examples cited.

3 **IV. Conclusion**

4       The court has carefully considered whether any arguable  
5 flaws in the Wade Reports should be dealt with by cross-  
6 examination rather than exclusion but finds this is not  
7 appropriate on this record. Accordingly, the parts of both Wade  
8 Reports opining on GAAP standards, auditing standards under GAAS,  
9 the interpretation of the APA, including indemnification issues  
10 and contingent withdrawal liability issues, and the operation of  
11 ERISA are excluded. The Wade Reports' analysis and opinions  
12 regarding the probability of failure is also unreliable and  
13 therefore excluded. To the extent the Mintzer Reports are based  
14 on these excluded aspects of the Wade Reports, they are also  
15 excluded. Finally, the inappropriate factual narratives and  
16 opinions regarding Defendants' motivations or intentions in the  
17 Wade Reports are also excluded.

18       The court requests that Defendants submit orders granting  
19 their respective *Daubert* Motions.

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22       \* \* \* \* \*       End of Memorandum Decision       \* \* \* \* \*  
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28 *Daubert*

-19-

1 Court Service List

2 None required.

28 *Daubert*

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